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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERT ALVES,

Defendant and Appellant.

B298708

Los Angeles County

Super. Ct. No. BA102783

APPEAL from an order of the Superior Court of Los Angeles County, Craig E. Veals, Judge. Affirmed.

Sally Patrone Brajevich, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Senior Attorney General, Amanda V. Lopez and Stephanie A. Miyoshi, Deputy Attorneys General, for Plaintiff and Respondent.

## INTRODUCTION

Senate Bill No. 1437 (2017-2018 Reg. Sess.) (SB 1437), effective January 1, 2019, amended the felony-murder rule and eliminated the natural and probable consequences doctrine as it relates to murder. Under Penal Code section 1170.95,<sup>1</sup> a person who was convicted under theories of felony murder or murder under the natural and probable consequences doctrine, and who could not be convicted of murder following the enactment of SB 1437, may petition the sentencing court to vacate the conviction and resentence on any remaining counts.

In 1997, a jury convicted appellant and defendant Robert Alves of first degree murder. In 2019, Alves filed a petition for recall and resentencing under section 1170.95. The trial court denied the petition, concluding Alves was not entitled to relief, in part because the jury found beyond a reasonable doubt he was the actual killer. In support of its conclusion, the court erroneously stated the jury found Alves personally used a firearm during the commission of the murder. The court noted, however, that even assuming the jury concluded Alves was not the actual killer, he would still be ineligible for relief because the record alternatively showed he aided and abetted the actual killer in the commission of first degree murder while harboring the intent to kill. On appeal, Alves argues the trial court erred by concluding the court file showed he was the actual killer. He further argues the court erred in denying his petition because he alleged sufficient facts to state a prima facie claim, and the court should have held a hearing where he was personally present and

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<sup>1</sup> All undesignated statutory references are to the Penal Code.

represented by appointed counsel. We disagree. Although it is true the jury found Alves did not personally use a gun during the commission of the murder, the trial court was correct in concluding Alves was ineligible for relief. Nothing in the court file suggests Alves's murder conviction was based on a felony-murder theory or the natural and probable consequences doctrine, the categories of convictions warranting relief under SB 1437. Because the court correctly concluded Alves was ineligible for relief as a matter of law, the court was not required to hold an additional hearing at which Alves or defense counsel was present. We also reject Alves's separate contention that the trial court prejudicially abused its discretion by mistakenly stating the jury found true the allegation that Alves personally used a firearm. We affirm the denial of Alves's section 1170.95 petition.

## **PROCEDURAL BACKGROUND**

The Los Angeles County District Attorney filed an information charging Alves and codefendant Anna Dominguez with first degree murder (§ 187, subd. (a); count one) and conspiracy to commit murder (§ 182, subd. (a)(1); count two).<sup>2</sup> The information alleged Alves and Dominguez personally used a firearm in the commission of count one (§ 12022.5, subd. (a)(1)). The information also alleged two special circumstances on count one: (1) lying in wait (§ 190.2, subd. (a)(15)); and (2) the murder was committed for financial gain (§ 190.2, subd. (a)(1)). With respect to the conspiracy charge, the information alleged three overt acts – the defendants or coconspirators: (1) obtained a

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<sup>2</sup> A third defendant, Ricardo B., was found guilty of murder in a juvenile court proceeding.

handgun; (2) drove to the scene; and (3) shot and killed victim Frank Villareal.

On March 13, 1997, a jury convicted Alves of first degree murder, found not true the allegation that he personally used a firearm, and found true the two special circumstance allegations. The jury convicted Alves of conspiracy to commit murder, found not true the allegation that he personally used a firearm, and found the three alleged overt acts true. The trial court sentenced Alves to life in prison without the possibility of parole on count one, and a concurrent term of life without the possibility of parole on count two. In an opinion filed November 19, 1999, this court, in case no. B115617, ordered each defendant's concurrent sentence on count two stayed under section 654, and affirmed the convictions of both defendants in all other respects.

## **FACTUAL BACKGROUND**

In the early morning hours of December 20, 1991, Frank Villareal was murdered while he slept in his bed. The assailants stood outside of his house and, through an open window, shot Villareal three times in the head. Three individuals were prosecuted for the murder: the victim's wife, Anna Dominguez, her lover, Robert Alves, and a third individual, Ricardo B., who was 15 years old at the time and subject to proceedings in juvenile court.

Before the murder, Alves was incarcerated with Daniel Dominguez ("Daniel"), the brother of codefendant Anna Dominguez ("Anna"). Anna wrote to her brother that her husband, Villareal, was physically abusing her. Daniel told Alves about the abuse and, in anger, suggested something should be

done to Villareal. Alves volunteered to handle the matter and began corresponding with Anna. After Alves was released, he and several others drove to Anna's house, where she told Alves and Ricardo B. she would pay them to "take care of" Villareal.

Later, Villareal returned home. Alves hid in the backyard with a companion and then rejoined the others who had traveled with him to Anna's house. Alves and Ricardo B. returned to the house. Alves had a handgun and Ricardo B. had a baseball bat. When they returned to the car, they told the group they had removed the window screen in the bedroom, inserted the gun, and shot Villareal. The next day, Alves returned to Anna's house, and she handed him something, possibly money. Within days, Anna completed a Department of Motor Vehicles form transferring a one-half interest in her car to Alves. When the police first investigated the murder, Anna identified several possible suspects besides herself and Alves, including the Mexican Mafia and people who had previously fought with her husband.

Alves violated parole and returned to state prison. Once back, he told Daniel he had murdered Villareal by shooting him three times in the back of the head. Daniel was surprised Alves had carried through on his threat to kill Villareal. In August 1994, after both Daniel and Alves had been released from prison, Daniel telephoned Villareal's mother and told her Alves and Anna had murdered her son. Villareal's mother contacted the police, who opened an investigation. As a result, criminal proceedings ensued against Alves and Anna, as well as juvenile proceedings against Ricardo B.

## PETITION FOR RESENTENCING

On February 15, 2019, Alves filed a petition for resentencing under section 1170.95. In the petition, Alves checked the boxes indicating an information was filed against him that allowed the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine; at trial, he was convicted of first or second degree murder under the felony-murder rule or the natural and probable consequences doctrine; and he could not now be convicted of first or second degree murder because of the changes in homicide law. Alves requested that counsel be appointed on his behalf.

On March 12, 2019, the trial court denied Alves's petition. In the denial order, the court recited the facts underlying Alves's conviction, stated the record established the jury convicted Alves of murder based on the theory that he was the actual killer, and that even assuming the jury convicted him on the theory that he aided and abetted the actual killer, he would still be ineligible for section 1170.95 relief.<sup>3</sup> In reaching its conclusion, the court noted Alves "and Ricardo approached the victim's window *together and expressly for no purpose other than to kill him*. They operated pursuant to their prearranged plan whereby each of them, armed with a deadly weapon, would approach the bedroom window of the residence to remove the screen so that one of them could shoot the victim." (Italics in original.) The court further

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<sup>3</sup> In concluding the jury found beyond a reasonable doubt Alves was the actual killer, the trial court erroneously stated the jury found true that he personally used a firearm in the commission of the murder.

explained: “Thus, even in the extremely unlikely event Ricardo was the actual shooter, [Alves] still remains answerable for the crime as an aider and abettor notwithstanding the 2019 amendments to Penal Code [section] 189.”

At some point, though it is not clear when from the record, the court appointed counsel for Alves. At a hearing held April 25, 2019, the court stated Alves’s attorney was unavailable, noted its previous written order denying the section 1170.95 petition was tentative, and that the tentative order would be discussed “at the next hearing assuming all parties are requesting [a hearing].” The final hearing occurred on May 22, 2019. Alves was not present for the hearing and his attorney did not appear. The court stated there had been ongoing discussion, and the understanding was the court would issue its tentative ruling, and if Alves’s attorney took exception with any of it, the parties would meet to discuss it. The court noted defense counsel had not since contacted the court, leading the court to infer defense counsel had no objection and agreed with the court’s decision. The prosecutor noted the court date had been set only in an abundance of caution in case defense counsel wanted to object rather than submit. The court ruled that its tentative order would stand.

Alves timely appealed.

## DISCUSSION

### A. Governing Principles

#### 1. SB 1437's limitation of accomplice liability for murder

The legislature enacted SB 1437 “to amend the felony-murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life.” (Stats. 2018, ch. 1015, § 1, subd. (f).) SB 1437 amended section 189 to provide that a participant in qualifying felonies during which death occurs generally will not be liable for murder unless the person was (1) “the actual killer,” (2) a direct aider and abettor in first degree murder, or (3) “a major participant in the underlying felony [who] acted with reckless indifference to human life[.]” (§ 189, subd. (e).)<sup>4</sup>

SB 1437 also “added a crucial limitation to section 188’s definition of malice for purposes of the crime of murder.” (*People v. Verdugo* (2020) 44 Cal.App.5th 320, 326 fn. omitted, rev. granted, S260598, Mar. 18, 2020 (*Verdugo*).) Under new section

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<sup>4</sup> This limitation does not apply “when the victim is a peace officer who was killed while in the course of the peace officer’s duties, where the defendant knew or reasonably should have known that the victim was a peace officer engaged in the performance of the peace officer’s duties.” (§ 189, subd. (f).)



188, subdivision (a)(3), “[m]alice shall not be imputed to a person based solely on his or her participation in a crime.” [Citations.]” (*People v. Lewis* (2020) 43 Cal.App.5th 1128, 1135 (*Lewis*), rev. granted, S260598, Mar. 18, 2020.) “As a result, the natural and probable consequences doctrine can no longer be used to support a murder conviction. [Citations.]” (*Ibid.*)

## **2. Petitions to vacate prior convictions**

SB 1437 also added section 1170.95 to the Penal Code. This section permits individuals who were convicted of felony murder or murder under a natural and probable consequences theory, and who could not be convicted of murder following SB 1437’s changes to sections 188 and 189, to petition the sentencing court to vacate the conviction and resentence on any remaining counts. (§ 1170.95, subd. (a).) A petition for relief under section 1170.95 must include: “(A) A declaration by the petitioner that he or she is eligible for relief under this section, based on all the requirements of subdivision (a). [¶] (B) The superior court case number and year of the petitioner’s conviction. [¶] (C) Whether the petitioner requests the appointment of counsel.” (§ 1170.95, subd. (b)(1).) If any of the information is missing “and cannot be readily ascertained by the court, the court may deny the petition without prejudice to the filing of another petition and advise the petitioner that the matter cannot be considered without the missing information.” (§ 1170.95, subd. (b)(2).)

“If the petition contains the required information, section 1170.95, subdivision (c), prescribes a two-step process for the court to determine if” it should issue an order to show cause. (*Verdugo, supra*, 44 Cal.App.5th at p. 327.) First, the court must

“review the petition and determine if the petitioner has made a prima facie showing that the petitioner falls within the provisions of this section.” (§ 1170.95, subd. (c).) If the petitioner has made this initial prima facie showing, and has requested that counsel be appointed, he or she is then entitled to appointed counsel. (*Ibid.*; *Lewis, supra*, 43 Cal.App.5th at p. 1140 [“trial court’s duty to appoint counsel does not arise unless and until the court makes the threshold determination that petitioner ‘falls within the provisions’ of the statute.”].) The court then reviews the petition a second time. If, in light of the parties’ briefing, it concludes the petitioner has made a prima facie showing that he or she is entitled to relief, it must issue an order to show cause. (§ 1170.95, subd. (c); *Verdugo, supra*, 44 Cal.App.5th at p. 328.)

“Once the order to show cause issues, the court must hold a hearing to determine whether to vacate the murder conviction and to recall the sentence and resentence the petitioner on any remaining counts.” (*Verdugo, supra*, 44 Cal.App.5th at p. 327, citing § 1170.95, subd. (d)(1).) At the hearing, the parties may rely on the record of conviction or present “new or additional evidence” to support their positions. (§ 1170.95, subd. (d)(3).)

## **B. Analysis**

### **1. Alves’s arguments concerning the procedures section 1170.95 affords**

On appeal, Alves argues the trial court erred by denying his section 1170.95 petition because he stated a prima facie case for relief. He further argues that because he made a prima facie showing, the trial court was required to conduct a hearing with

defense counsel and Alves present, and the court erred by summarily denying his petition without him or defense counsel present. Alves's claims regarding the procedures section 1170.95 affords raise questions of law subject to de novo review. (See *In re T.B.* (2009) 172 Cal.App.4th 125, 129-130 [interpretation of statute reviewed de novo].) Applying this standard, we reject Alves's contentions.

The trial court was allowed to conclude, as it did, at the first stage of the section 1170.95 analysis, that Alves was ineligible for relief as a matter of law. (*Verdugo, supra*, 44 Cal.App.5th at p. 329 ["The court's role [at the preliminary eligibility determination stage] is simply to decide whether the petitioner is ineligible for relief as a matter of law . . . ."].) In concluding Alves was ineligible for relief, the court was entitled to evaluate the "documents in the court file or otherwise part of the record of conviction that [were] readily ascertainable . . . ." (*Ibid.*)<sup>5</sup> Nothing in the court file suggested Alves was charged with or convicted of murder on a felony-murder or natural and probable consequences theory. Rather, as the trial court correctly explained in its order, the facts of Alves's murder conviction necessarily rested on one of two theories: either he was the actual killer or he directly aided and abetted the actual killer while harboring the intent to kill. (See § 189, subd. (e) [actual killers are still liable for murder, as are direct aider and abettors in first

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<sup>5</sup> We therefore reject the contention that the court, in determining whether Alves successfully made an initial prima facie showing of eligibility for relief, was required to accept as true the factual allegations in his petition.

degree murder who harbor the intent to kill].) The court was therefore correct in concluding Alves was not entitled to relief.<sup>6</sup>

Finding no error in the court’s conclusion that Alves was ineligible for relief, we also reject Alves’s argument that the court erred by conducting an ex parte hearing without Alves or defense counsel present. “If, as here, the court concludes the petitioner has failed to make the initial prima facie showing required by subdivision (c), counsel need not be appointed.” (*Verdugo, supra*, 44 Cal.App.5th at pp. 332-333.) The trial court went beyond what was statutorily required by appointing counsel and allowing an opportunity for objection or further hearing before adopting its tentative ruling.<sup>7</sup>

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<sup>6</sup> In addition to the reasons stated by the trial court, Alves is ineligible for section 1170.95 relief for a separate reason. By finding Alves guilty of conspiracy to commit murder, the jury necessarily found beyond a reasonable doubt that he intended to kill Villareal. (*People v. Swain* (1996) 12 Cal.4th 593, 607 [“a conviction of conspiracy to commit murder requires a finding of intent to kill, and cannot be based on a theory of implied malice.”]; see Stats. 2018, ch. 1015, § 1, (f) [one of the Legislature’s purposes in enacting SB 1437 was to amend homicide law “to ensure that murder liability is not imposed on a person who . . . did not act with the intent to kill[.]”].) Because the record shows the jury concluded beyond a reasonable doubt Alves intended to kill Villareal, it is clear Alves falls outside the group of defendants SB 1437 was intended to benefit.

<sup>7</sup> We also reject Alves’s argument that he was constitutionally entitled to a hearing at which he and counsel were present. Senate Bill 1437 “constituted an act of lenity that does not implicate defendants’ Sixth Amendment rights. [Citation.]” (*People v. Anthony* (2019) 32 Cal.App.5th 1102, 1156.)

## **2. Alves's abuse of discretion argument**

Alves next argues the trial court abused its discretion by partially basing its decision on the erroneous factual premise that the jury found he personally used a firearm in the murder of Villareal. Although it is true the trial court was incorrect in stating the jury found Alves personally used a firearm, we conclude the court was ultimately correct in denying Alves's 1170.95 petition. (See *People v. Smithey* (1999) 20 Cal.4th 936, 972 [a decision that is legally correct will not be disturbed on appeal merely because it is given for an incorrect reason].) As discussed above, the court correctly concluded Alves was ineligible for relief whether or not the jury concluded he was the actual killer; nothing in the record suggests Alves was convicted based on a felony-murder or natural and probable consequences theory; and by finding Alves guilty of conspiracy to commit murder, the jury necessarily concluded beyond a reasonable doubt he intended to kill Villareal. For these reasons, we affirm the trial court's denial of Alves's petition.

## **DISPOSITION**

The order denying Alves's petition under section 1170.95 is affirmed.

## **NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

CURREY, J.

We concur:

MANELLA, P.J.

WILLHITE, J.